Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(W)-1453–08 OF 2016, W-02(W)-1796–09 OF 2016 AND W-02(W)-1802–09 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
27 NOVEMBER 2017

Labour Law — Employment — Contract of employment — Breach — Allegation of — Whether proved — Employees received secret profits by virtue of profit sharing arrangement with vendors without company's authority — Whether company's claim for secret profits sustainable — Whether remedies for breach of employment contract limited to exercise of company's discretion to dismiss employees — Whether company entitled to general damages — Withdrawal of suit from Industrial Court for unfair dismissal — Whether employees deemed to have accepted company's decision to dismiss them — Whether employees admitted to being guilty of misconduct — Whether employees estopped from contending that they were not liable for breaches of employment contracts

The respondents were senior management employees in the IT department of the appellant company ('the appellant'), with critical functions in the purchasing of IT items from the appellant's registered vendors. The appellant conducted an internal review of the reasonableness of the prices it paid for IT related items and found that a select group of the appellant's registered IT vendors were consistently invited to participate in the tender exercise and their bids were regularly successful. Upon further investigation, it was discovered that the respondents had a private/commercial relationship with the shareholders and directors of these selected IT vendors. The appellant took possession of the notebook computers assigned to the respondents and found that the respondents were involved in unauthorised profit sharing agreements with certain IT vendors of the appellant, and they had received a percentage of the purchase price as secret profits that the appellant paid to these IT vendors. The appellant convened a domestic inquiry and the respondents were dismissed for misconduct. Both respondents filed representations of unfair dismissal under s 20 of the Industrial Relations Act 1967 and their cases were referred to the Industrial Court for determination. The appellant commenced an action in the High Court, whereby the judge held that the respondents had breached their employment contract with the appellant but, as the appellant had already dismissed the respondents, the appellant was thus not entitled to general damages and that the claim for secret profits was unsustainable. Nevertheless, the respondents were to pay costs of RM100,000 equally because the appellant had proven that the respondents had breached their contracts of

employment. Subsequent to the decision of the High Court, the respondents unconditionally withdrew their cases of unfair dismissal against the appellant at the Industrial Court and their cases were struck off without liberty to file afresh. Three appeals arose against the judgment of the High Court. In the main appeal No W-02(W)-1453–08 of 2016, the appellant complained that, inter alia, its claim for breach of employment contract as well as claim related to secret profits made by the respondents ought to have been allowed. In appeals No W-02(W)-1802–09 of 2016 and No W-02(W)-1796–09 of 2016 respectively, the respondents complained that the judge had ordered the respondents to pay the costs of RM100,000 to the appellant.

Held, allowing the appellant's appeal; dismissing the respondents' appeals:

(1) The High Court judge made a finding that there was breach of contract but stated that the appellant was not entitled to damages as they had obtained a relief by dismissing the respondents for misconduct. This proposition was not supported by any authorities and was flawed. The act of dismissing the employee for misconduct and the employee seeking relief in the Industrial Court was a separate cause of action per se. It had nothing to do with the right to sue for breach of contract and claiming damages (see para 6(a)).

(2) The pecuniary relationship between the respondents and the shareholders/directors of the IT vendors were not merely circumstantial evidence and proved, on a balance of probabilities, receipt of secret profits. The judicial commissioner ('JC') committed errors of law and fact when he dismissed the appellant's claim for recovery of secret profits despite the fact that the computer generated documents were genuinely recovered from the computer assigned to the first respondent and were authentic. Various circumstantial evidence, when viewed together, pointed towards the irresistible conclusion that the respondents identified in the spreadsheets received secret profits by virtue of the profit sharing arrangement. The facts of the case required the first respondent to give evidence as the documents recovered from his computer was within his knowledge, failing which the appellant's evidence had to be accepted by the court, unless it was inherently improbable. The failure of the first respondent to give evidence was fatal and any reasonable tribunal appraised of the facts of the case would have no option save to enter judgment for the appellant (see para 18).

(3) By unequivocally withdrawing their cases in the Industrial Court, the respondents were deemed to have accepted the appellant's decision to dismiss them for those charges. In short, the respondents admitted that they were guilty of the misconducts and the appellant was entitled to dismiss them. It was therefore no longer open to the respondents to take the position in this suit that they were not liable for the same

misconducts, which were also the cause of action in this suit. The respondents could not 'approbate and reprobate' and were estopped from contending that they were not liable for the breaches of their employment contracts. The appellant's claim for breach of contracts of employment was no longer open to challenge by the respondents (see para 17).

(4) The JC erred in law and in fact when he: (a) failed to award general damages to the appellant, for the respondents' breaches of the terms and conditions of their respective contracts of employment and for their breaches of fiduciary obligations; (b) refused to grant an order for general damages on the basis that the appellant had availed itself to the remedy of dismissal; (c) failed to appreciate that the remedies for breach of employment contract was not limited to the exercise of the appellant's discretion to dismiss the respondents and would include, inter alia, a claim for general damages; and (d) refused to grant an order for general damages, nominal or otherwise, which was the direct and natural consequence of the proven breach of the terms and conditions of the contracts of employment of the respondents, on the basis that the appellant had suffered no financial losses. The decision of the judge was not in consonant with his findings of facts leaving the appellate court with no option but to set aside the judgment of the High Court in refusing to enter judgment for the appellant (see paras 18–19).

[Bahasa Malaysia summary

Responden-responden adalah pekerja pengurusan kanan dalam jabatan IT syarikat perayu ('perayu'), dan mempunyai fungsi kritikal dalam pembelian barang-barang IT dari vendor-vendor berdaftar perayu. Perayu menjalankan penyemakan dalaman semula harga bayaran untuk item-item IT dan mendapati satu kumpulan terpilih vendor-vendor berdaftar IT secara konsisten dijemput untuk mengambil bahagian dalam tawaran tender dan tawaran mereka sentiasa berjaya. Siasatan lanjutan mendapati bahawa responden-responden mempunyai hubungan peribadi/komersial dengan pemegang-pemegang saham dan pengarah-pengarah vendor-vendor IT yang terpilih ini. Perayu mengambil alih komputer yang digunakan oleh responden-responden dan mendapati bahawa responden-responden terlibat dengan perjanjian perkongsian keuntungan yang tidak dibenarkan dengan vendor-vendor IT perayu, dan mereka menerima peratusan harga belian sebagai keuntungan rahsia yang dibayar perayu kepada vendor-vendor IT ini. Perayu mengadakan siasatan domestik dan responden-responden dibuang kerja atas salah laku. Kedua-dua responden memfailkan representasi pembuangan kerja tanpa alasan adil bawah s 20 Akta Perhubungan Perusahaan 1967 dan kes-kes mereka dirujuk ke Mahkamah Perusahaan untuk diputuskan. Perayu memulakan tindakan di Mahkamah Tinggi, di mana hakim memutuskan bahawa responden-responden melanggar kontrak

pekerjaan dengan perayu tetapi perayu telah pun memecat responden-responden, oleh itu perayu tidak berhak untuk mendapat ganti rugi am dan tuntutan untuk keuntungan rahsia tidak mampan. Walau bagaimanapun, responden-responden diarahkan membayar kos RM100,000 bersama kerana perayu telah membuktikan bahawa responden-responden telah melanggar kontrak pekerjaan mereka. Berikutan keputusan Mahkamah Tinggi, responden-responden menarik balik tanpa syarat kes mereka bagi pembuangan kerja tanpa alasan yang adil mereka terhadap perayu di Mahkamah Perusahaan dan kes-kes masing-masing dibatalkan dengan kebebasan untuk memfailkan semula. Tiga rayuan berbangkit terhadap penghakiman Mahkamah Tinggi. Dalam rayuan utama No W-02(W)-1453–08 Tahun 2016, perayu mengadu bahawa, antara lain, permohonan untuk pelanggaran kontrak pekerjaan dan tuntutan berhubungan keuntungan rahsia yang diperoleh oleh responden-responden harus dibenarkan. Dalam rayuan-rayuan No W-02(W)-1802–09 Tahun 2016 dan No W-02(W)-1796–09 Tahun 2016 masing-masing, responden membuat aduan bahawa hakim telah memerintahkan responden-responden membayar kos RM100,000 kepada perayu.

Diputuskan, membenarkan rayuan perayu; menolak rayuan-rayuan responden-responden:

(1) Hakim Mahkamah Tinggi membuat dapatan bahawa terdapat pelanggaran kontrak tetapi menyatakan bahawa perayu tidak berhak ke atas ganti rugi kerana ia telah memperoleh relif dengan membuang kerja responden-responden untuk salah laku. Cadangan ini tidak disokong oleh apa-apa autoriti dan adalah cacat. Tindakan memecat pekerja untuk salah laku dan pekerja menuntut relif di Mahkamah Perusahaan adalah kausa tindakan yang berasingan. Ia tiada kena mengena dengan hak menyaman untuk pelanggaran kontrak dan tuntutan ganti rugi (lihat perenggan 6(a)).

(2) Hubungan kewangan antara responden dan pemegang-pemegang saham/ pengarah-pengarah vendor-vendor IT bukan sekadar keterangan mengikut keadaan dan membuktikan, atas imbangan kebarangkalian, penerimaan keuntungan rahsia. Pesuruhjaya kehakiman ('PK') telah melakukan kesilapan undang-undang dan fakta apabila beliau menolak tuntutan perayu untuk mendapatkan balik keuntungan rahsia walaupun dokumen-dokumen yang dijana komputer telah diperoleh dengan tulen daripada komputer yang digunakan responden pertama dan adalah sahih. Beberapa keterangan ikut keadaan, apabila dilihat bersama, membawa pada kesimpulan yang tidak boleh disangkal bahawa responden-responden yang dikenal pasti dalam lembaran sebaran telah menerima keuntungan rahsia melalui perjanjian perkongsian keuntungan. Fakta-fakta kes memerlukan responden pertama memberikan keterangan kerana dokumen-dokumen telah diambil

daripada komputer yang digunakan olehnya dan adalah dalam pengetahuannya, dan kegagalan berbuat demikian bermaksud keterangan perayu akan diterima mahkamah, melainkan ia mungkin tidak *probable*. Kegagalan responden pertama memberi keterangan adalah mencacatkan dan mana-mana tribunal munasabah yang menilai fakta-fakta kes itu tidak akan ada pilihan lain tetapi untuk memasukkan penghakiman memihak pada perayu (lihat perenggan 18).

(3) Dengan menarik balik kes-kes mereka dalam Mahkamah Perusahaan, responden-responden dianggap telah menerima keputusan perayu untuk membuang mereka dari kerja atas pertuduhan-pertuduhan tersebut. Dalam erti kata lain, responden-responden mengakui kesalahan mereka dan perayu berhak membuang kerja mereka. Oleh itu, tidak terbuka untuk responden-responden mengambil kedudukan dalam guaman ini bahawa mereka tidak bertanggungjawab ke atas salah laku yang juga kausa tindakan dalam guaman ini. Responden-responden tidak boleh 'aprobat dan reprobat' dan diestop daripada menghujahkan mereka tidak bertanggungjawab untuk pelanggaran kontrak pekerjaan. Tuntutan perayu untuk pelanggaran kontrak tidak boleh dibantah oleh responden-responden (lihat perenggan 17).

(4) Pesuruhjaya kehakiman khilaf dari segi undang-undang dan fakta apabila beliau: (a) gagal mengawardkan ganti rugi am kepada perayu, untuk pelanggaran terma-terma dan syarat-syarat kontrak pekerjaan oleh responden-responden masing-masing dan juga untuk pelanggaran kewajipan fidusiari; (b) enggan membenarkan perintah ganti rugi am atas dasar bahawa perayu telah memanfaatkan dirinya dengan remedi pemecatan; (c) gagal menghargai bahawa remedi-remedi pelanggaran kontrak pekerjaan tidak terhad pada pelaksanaan budi bicara perayu untuk memecat responden-responden dan akan termasuk, antara lain, tuntutan ganti rugi am; dan (d) enggan memberikan kebenaran perintah untuk ganti rugi am, secara nominal atau sebaliknya, dan ini adalah akibat langsung dan semulajadi pembuktian pelanggaran terma-terma dan syarat-syarat kontrak pekerjaan responden-responden, atas dasar bahawa perayu tidak mengalami apa-apa kerugian kewangan. Keputusan hakim tidak selaras dengan dapatan fakta, dan ini menyebabkan mahkamah rayuan tiada pilihan lain tetapi untuk mengetepikan penghakiman Mahkamah Tinggi dalam keengganannya untuk memasukkan penghakiman memihak kepada perayu (lihat perenggan 18–19).]

Notes

For cases on contract of employment, see 7(2) *Mallal's Digest* (8th Ed, 2017 Reissue) paras 1104–1136.

Cases referred to

Charter v Sullivan [1957] 2 QB 117, CA (refd)
Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64, FC (refd)
Crawford and others v Financial Institutions Services Ltd [2005] UKPC 40, PC (refd)
Gee v Lancashire and Yorkshire Rly Co (1860) 6 H & N 211 (refd)
Hiew Kon Fah and Anor v Kwan Ngen Wah & Ors [2008] MLJU 95; [2008] 1 LNS 89, HC (refd)
Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor [2015] MLJU 992; [2015] 6 CLJ 449, CA (refd)
Mediana (Owners) v Comet (Owners, Master and Crew of the Lightship), The Mediana [1900] AC 113, HL (refd)
Melachrino v Nickoll and Knight [1920] 1 KB 693, KBD (refd)
R v Kakelo [1923] 2 KB 793 (refd)
Ruxley Electronics and Construction Ltd v Forsyth [1995] 3 All ER 268, HL (refd)
Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy) [2017] 4 MLJ 570; [2017] 1 LNS 709, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Eng Seong v Malayan Banking Bhd [1997] MLJU 36, HC (refd)
Yeo Ing King v Melawangi Sdn Bhd [2016] 5 MLJ 631, CA (refd)

Legislation referred to

Evidence Act 1950 ss 106, 114(g)

Appeal from: Civil Suit No S-22–17 of 2009 (High Court, Kuala Lumpur)

Steven Thiru (Janice Leo, M Mehala dan David Ng with him) (Shook Lin & Bok) in Civil Appeal No W-02(W)-1453–08 of 2016 for the appellant.
Joslyne Goonting (Lum May Lan, Kum Shin Jow and Albert Koo with her) (Kum & Partners) in Civil Appeal Nos W-02(W)-1796–09 of 2016 and W-02(W)-1802–09 of 2016 for the appellant.
Steven Thiru (Janice Leo, M Mehala dan David Ng with him) (Shook Lin & Bok) in Civil Appeal Nos W-02(W)-1796–09 of 2016 and W-02(W)-1802–09 of 2016 for the respondent.
Joslyne Goonting (Lum May Lan, Kum Shin Jow and Albert Koo with her) (Kum & Partners) in Civil Appeal No W-02(W)-1453–08 of 2016 for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] There are three appeals before us arising from a judgment of the High Court. We heard all the three appeals on 15 August 2017 and reserved judgment.

[2] The main appeal is Appeal No W-02(W)-1453–08 of 2016. In this appeal, the appellant/plaintiff complains that, inter alia, its claim for breach of employment contract as well as claim related to secret profits made by the employees ie the first and second defendants ought to have been allowed.

[3] The first and second defendants had filed Appeal Nos W-02(W)-1802–09 of 2016 and W-02(W)-1796–09 of 2016 respectively complaining that the learned judge having dismissed the plaintiff's claim had ordered the defendants to pay the costs of RM100,000 to the plaintiff.

[4] In the instant case, it is not in dispute that: (i) the defendants were dismissed from employment, for the misconduct related to breach of employment contract and claims related to secret profits; (ii) the defendants then proceeded to seek relief for unfair dismissal through the Industrial Court; (iii) before the hearing in the Industrial Court, the defendants withdrew their claim; (iv) the plaintiff had filed a notice of motion encl 5(a) to admit the document related to the Industrial Court for the purpose of the appeal; and (v) we allowed the notice of motion and directed the plaintiff to file a supplementary record consisting of the documents stated in encl 5(a).

[5] In addition, it is also not in dispute that: (i) the documents which the plaintiff had substantially relied on to establish its claim for breach of contract and the secret profits were recovered from the computer of the first defendant as was stated by PW3 in his witness statement; (ii) notwithstanding that the first defendant had filed a witness statement and was present in court during the hearing to instruct solicitors to cross-examine the witnesses of the plaintiff; the first defendant himself did not enter in the witness box to give evidence; (iii) the documents retrieved from the first defendant was placed in Bundle B and subsequently marked as exhibit, thereby establishing a strong prima facie case against the first defendant as it was not controverted by the first defendant himself.

[6] The learned trial judge has set out the facts and evidence in an articulate manner. On the first reading of the judgment it was quite obvious that the judgment suffered from grave error of law on the face of record as well as it was contradictory and in consequence warrants the judgment to be set aside in limine (see *Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy)* [2017] 4 MLJ 570; [2017] 1 LNS 709). Briefly there are three reasons for saying so. They are as follows:

(a) the learned judge makes a finding that there was breach of contract but says the plaintiff is not entitled to damages as they have obtained a relief by dismissing the defendants for misconduct. This proposition in our view by the learned judge was not supported by any authorities. The proposition in our view is flawed. The act of dismissing the employee for

misconduct and the employee seeking relief in the Industrial Court is a separate cause of action per se. It has nothing to do with the right to sue for breach of contract and claiming damages. That part of the judgment reads as follows:

> 39. Accordingly, having regard to the analysis set out in the preceding paragraphs, I found that the joint property purchases amounted to a contravention of the Purchasing Policies, and consequently a breach of the defendants' terms of employment with the plaintiff.
>
> *Remedy available to the plaintiff for breach of terms of employment*
>
> 40. In my judgment, the plaintiff had already availed itself of its remedy for breach of the employment terms when it dismissed the defendants.

(b) in the instant case, the first defendant did not give evidence and the documents tendered and marked as exhibits as well as the oral evidence prima facie incriminates him. However, the learned judge chose to ignore well established principles as well as cases inclusive of s 114(g) of the Evidence Act 1950 ('the EA 1950') to rule that the burden of proof in a civil case is not on a defendant. That part of the judgment reads as follows:

> Section 114(g) of the Evidence Act 1950
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> 76. It was advanced for the plaintiff that this court ought to draw an adverse inference against the first defendant on account of his failure to take the stand to give testimony in support of the defendants' case. The brief answer to this argument is that, where the burden of proof in a civil case is not on a defendant, his failure to testify will not raise the presumption in section 114(g) of the Evidence Act 1950: see *Selvaduray v Chinniah* [1939] MLJ 253.

[7] It is well established as a general rule that 'burden of proof' in a civil case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff's evidence. The facts of this case are not one related to no case to answer where the defendant is not required to give evidence (see *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992; [2015] 6 CLJ 449). The facts of the case requires the first defendant to give evidence as the documents recovered from his computer is within his knowledge, failing which the plaintiff's evidence has to be accepted by the court, unless it is inherently improbable (see *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64). In addition, if the first defendant does not give evidence, the court may have to grant all the prayers sought against him if the prayers are legally maintainable.

[8] Support for the proposition is found in a number of cases as well as the

provisions of the EA 1950. To name a few are as follows:

(a) in *R v Kakelo* [1923] 2 KB 793 the court considered the ground rules for the burden to shift and stated:

> In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge, with respect to the fact to be proved, which may be possessed by the parties respectively.

(b) for example, s 106 of the EA 1950 states:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

(c) at p 638 of *Janab's Key to Law of Evidence* (4th Ed revised by Dato' Mah Weng Kwai) the learned authors in dealing with s 106 observes:

> 106 Burden of proving fact especially within the knowledge.
>
> This section appears to be an exception to the rule in section 101 which states that he who asserts must prove. Under this section where a fact is especially within the knowledge of a party, the burden of proving that fact lies upon him.
>
> [See *PP v Kum Chee Cheong* [1992] 2 SLR 126].

(d) in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, the Federal Court observed:

> [4] In our judgment, *two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. …*
>
> [5] *The second consequence is that the court ought to have drawn an adverse inference against the first respondent … Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference …* (Emphasis added.)

(e) s 114(g) of the EA 1950 states:

> ILLUSTRATIONS
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> The court may presume —
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> ...
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

(f) the court in *Crawford and others v Financial Institutions Services Ltd* [2005] UKPC 40 observed:

> It is well settled that in civil proceedings *the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the*

knowledge of himself or his employees. In *Herrington v British Railways Board* [1972] AC 877, 930, Lord Diplock said of such a decision:

> This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it *cannot complain if the court draws from the facts which have been disclosed all reasonable inferences* as to what are the facts which t*he defendant has chosen to withhold*. (Emphasis added.)

[9] In the instant case, the documents recovered from the first defendant's computer which was placed in Bundle B was marked as exhibits. That is to say, if the contents are not discredited by the first defendant it may be fatal for the first defendant's case (see *Yeo Ing King v Melawangi Sdn Bhd* [2016] 5 MLJ 631).

GENERAL JURISPRUDENCE ON NOMINAL DAMAGES

[10] The measure of damages whether in contract or tort is not an easy subject to deal with, as the courts have not set out clear guideline or methodology for the calculation for the head of damages (see *Mediana (Owners) v Comet (Owners, Master and Crew of the Lightship), The Mediana* [1900] AC 113 and *Gee v Lancashire and Yorkshire Rly Co* (1860) 6 H & N 211).

[11] In an action for breach of contract it is often the case that it is possible to determine damages with precision or at least to some accepted norms of accuracy, though it may not be able to compensate the actual loss suffered by the litigant. In tort, measure of damages to property can be based on some factors to derive at quantum. However, it is much more difficult in the case of personal wrongs. In short, no hard and fast rules can be employed and the measure certainly depends upon variety of circumstances, which the trial court may want to consider but it may not have been set out in the judgment the methodology in a precise manner. The quantum of damages is a subject matter, which even the appellate courts are reluctant to disturb unless it is exorbitant and/or does not reflect the gravity of the loss (see *Hiew Kon Fah and Anor v Kwan Ngen Wah & Ors* [2008] MLJU 95; [2008] 1 LNS 89).

[12] It is now trite that the court in assessing damages take into consideration three fundamental principles. They are as follows: (i) restitution in integrum, (ii) remoteness of damages; (iii) mitigation of damages. *C Kameshwar Rao's Treatise on Law of Damages Compensation* (5th Ed) succinctly summarises the concept as follows:

> There are three fundamental principles upon which the law proceeds to determine the measure of damages. The first and foremost principle is that of restitution in integrum. As has already been observed, in all cases of wrongful acts, whether of tort or breach of contract, the law only adopts the principle of institution in integrum

A subject to the qualification that the damages must not be too remote; that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. Therefore, where an injury is to be compensated by damages, in settling the sum of money to be given in reparation of the damage, you should as nearly as possible get at that sum of money which will put the party who has been B injured or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting his compensation or reparation. In other words, the award must be of such a sum as that by which he is the worse for the defendant's wrongdoing. The rule appears to be the same in actions upon contract also, for a party who has sustained loss by reason of a breach of contract is, C with respect to damages, entitled to be placed in the same situation as he would been in if the contract had been performed. But as Lord Dunedin has forcibly put it, 'restitution in integrum' is a phrase which is properly applied when you wish to express a condition which is imposed upon a person seeking to rescind a contract. I do not think it can be properly applied to questions of tort, and the illustration I give a very simple one in the sense say, I have had restitution in integrum. The true D method of expression, I think, is, that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, in so far as money can be, the loss which he has suffered as the natural result of the wrong done to him.

There is no particular limit to the amount of damages that can be awarded by a court of law, and in proper cases the amount may rise to almost any sum of money E while, on the other hand, it may be a single farthing. It is largely in the discretion of the Judge or the jury, but is regulated by well-established rules.

(ii) Remoteness of damage — The next principle in determining the damages, whether in contract, or tort, is that underlying the rule as to remoteness of damage. Though the measure in actions of contract and tort differs to some extent, the rule F as to remoteness of damage is precisely the same, in both. It frequently happens that when a wrongful act is committed, a person suffers damage, but although he may have a cause of action for the wrongful act, yet he cannot lay any claim for compensation for the damage, because the connection between the damage and the wrongful act is too remote. The principle of the remoteness of damage is based upon G the well-known maxim 'the *jure non remote casua sed proxima spectatur*', and prevents the plaintiff from recovering any damages that do not flow or arise as a direct consequence of the wrongful act complained of.

(iii) Mitigation of damage — Another principle universally recognized is that which underlies the rule as to mitigation of damages. In all claims for damages whether arising from contract or tort, a duty is cast upon the plaintiff to mitigate or H minimize the damages, that is, to take all reasonable precautions to reduce the amount of loss or damage arising from the wrongful act of the defendant. Any loss or damage, which with the exercise of reasonable care the plaintiff could have avoided, will be deemed too remote to be recoverable. With these general observations, it is proposed to discuss more elaborately the principles governing I measure of damages in action upon contracts and torts under separate heads.

[13] In *Mediana (Owners) v Comet (Owners, Master and Crew of the Lightship), The Mediana* [1900] AC 113, the House of Lords explained nominal damages as follows:

'Norminal damages' is a technical phrase which means that you have negative anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

[14] There are a number of cases to support the proposition that once a breach has been proved, the claimant is entitled to damages. If he fails to prove any actual or substantial loss, then his entitlement will be limited to nominal damages only (see *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268; *Charter v Sullivan* [1957] 2 QB 117; *Melachrino v Nickoll and Knight* [1920] 1 KB 693 and *Tan Eng Seong v Malayan Banking Bhd* [1997] MLJU 36).

[15] Nominal damages is related to court's own assessment taking a common sense approach. For example, in the instant case, there was a finding of breach of contract and subsequently the defendants were sacked. On the face of it, at least the following stated below will be the list in a crude manner for time and money spent to enter into employment contract which can be a foundation to consider nominal damages in instances where evidence was not led to establish damages. They are as follows:

(a) time spent to enter into contract of employment;

(b) legal costs if any for preparation and stamping of the contract;

(c) costs of paper, printing material, secretarial services, etc; and

(d) subsequent time to be spent to engage new employees.

[16] As we had said, the above is only a crude list to debunk any argument that a party to written contract will not have suffered any damages if there was only a breach of contract and the quantum related to loss or damage was not established.

BRIEF FACTS

[17] The facts of the appeal and grounds has been summarised by the learned counsel for the appellant and to save courts time we repeat verbatim the relevant parts which read as follows:

(1) The appeal is against the decision of the High Court dismissing the Appellant's claim for general and special damages against their former employees, the Respondents, for breaching their employment contracts with the Appellant.

(2) The breach is in respect of two heads of claim, viz,

(1) acting in conflict of interest; and

A (2) participating, in, and obtaining pecuniary benefit from, an unauthorized scheme of secret profits.

The Dispute.

(3) The Appellant was in the business of forecast and racing totalisator.

B (4) Both Respondents were senior management employees in the IT department, with critical functions in the purchasing of IT items from the Appellant's registered vendors.

(5) This involved initiating purchases of IT items, and where a tender is required, the Respondents would participate in the evaluation of tenders as well as in the C recommendation of awards to vendors.

(6) The Appellant conducted an internal review of the reasonableness of the prices it paid for IT related items. It revealed that a select group of the Appellant's registered IT vendors were consistently invited to participate in the tender exercise and their bids were regularly successful. On average, these successful bids were D between *30% to 100%* higher than the bids of IT vendors that were independently sourced.

(7) The successful select group of IT vendors included Gallant Mark Sdn Bhd ('Gallant Mark') and iConnect2 Technologies Sdn Bhd ('iConnect2').

E (8) Upon further investigations, it was discovered that the Respondents had a private/commercial relationship with two shareholders and directors of Gallant Mark and iConnect2.

(9) The investigations revealed that the Respondents had jointly purchased a property ('Solaris') with a director and shareholder of Gallant Mark and iConnect2 F ('Ho Yew Fai').

This is not disputed by the Respondents. The transaction was not disclosed to the Appellant.

(10) The Appellant suspended the Respondents because they had not disclosed their personal relationship with Ho Yew Fai and they had therefore placed themselves in G a position of conflict of interest.

(11) It was subsequently discovered that the 1st Respondent had jointly purchased another property ('Lorong Midah') from another shareholder and director of Gallant Mark and iConnect2 ('Foo Kok Kee'). This is not disputed by the 1st Respondent. This transaction was also not disclosed to the Appellant.

H

(12) The Appellant further took possession of the notebook computers assigned to the Respondents. A forensic examination of the data contained in the hard disc of the 1st Respondent's notebook computer showed:-

(1) an unauthorized profit sharing arrangement between the Respondents, I certain shareholders and directors of the Appellant's registered IT vendors, particularly Gallant Mark and iConnect2, for the purchases of IT items by the Appellant;

(2) this profit sharing arrangement was found in about 400 Microsoft Excel spreadsheets and web-based mails/correspondence. There was a breakdown of the profit distribution (in percentages) that co-related to the Appellant's purchase orders;

(3) at the trial, the Appellant established that:

(a) the above-said Microsoft Excel spreadsheets were discovered in the 1st Respondent's notebook computer, and

(b) the evidence of Cavin Choo ('SP-5'), the independent forensic expert from KPMG, indicated that the 1st Respondent was the author of the spreadsheets. He testified that the contents of the 1st Respondent's notebook was 'last modified' whilst still in his possession and a large number of the Microsoft Excel files were moved to 'recycle'.

(4) next, the Microsoft Excel spreadsheets had file names, such as 'reward'. Each reward file related to a particular transaction, including description of the type of item, the quantity, the list price, the cost price and the total profits.

The file also indicated that the total profits were to be distributed to parties referred to as 'mek', 'wan', 'con', 'kh', 'comp' and 'ct';

(5) there were similarities between the descriptions, unit list prices and/or quantities of IT items in the reward files recovered from the 1st Respondent's notebook computer and IT items actually purchased by the Appellant; and

(6) there was a co-relation between the actual purchases and the apparent profit from these purchases (which was a percentage of the purchase price) was shared amongst the parties referred to as 'mek', 'wan', 'con', 'kh', 'comp' and 'ct'.

(13) It was evident that the respondents were involved in an unauthorised profit sharing arrangement with certain IT vendors of the appellant, and they had received a percentage of the purchase price as secret profits that the appellant paid to these IT vendors. In this regard, the acronyms (in the reward files) 'mek' referred to the first respondent whilst 'wan' referred to the second respondent.

(14) The IT vendors who were complicit in the arrangement included Gallant Mark and iConnect2. It was established at the trial that a majority of the tenders (51) in the 65 impugned transactions in this case, were with these two vendors, and the tenders were awarded to them on the recommendation of the 2nd Respondent with the approval of the 1st Respondent.

(15) The Appellant convened a domestic inquiry and the Respondents were dismissed for misconduct. Both Respondents filed representations of unfair dismissal under s 20 IRA 1967 and their cases were referred to the Industrial Court for determination.

The High Court.

(16) The Appellant commenced the instant action in the High Court and the learned Judge decided as follows:-

(1) the Respondents had breached their employment contract with the Appellant in respect of the joint purchases of the Solaris and Lorong Midah properties;

(2) however, as the Appellant had already dismissed the Respondents, the Appellant was not entitled to general damages;

(3) the claim for secret profits was unsustainable;

(4) nevertheless, the Respondents were to pay costs of RM100,000.00 equally because the Appellant had proven that the Respondents had breached their contracts of employment (in respect of the joint purchases of the properties) and because it was the conduct of the Respondents that had led to the litigation of the matter, in that there was impropriety on their part 'due to the existence of the pecuniary relationship between them and the directors and shareholders and/or directors of the registered vendors' of the Appellant.

Withdrawal of the cases in the Industrial Court.

(17) Subsequent to the decision of the High Court, the Respondents unconditionally withdrew their cases (of unfair dismissal) against the Appellant at the Industrial Court. Their cases were struck off without liberty to file afresh. At the time, the 2nd Respondent's trial at the Industrial Court had already commenced (and there were 7 days of trial) while the 1st Respondent's case was embroiled in a number of interlocutory matters without the trial beginning.

(18) The legal effect of the withdrawal to the instant appeal is important for the purposes of this appeal, as:

(1) the charges of misconduct against the Respondents (except one charge against the 1st Respondent) which were the subject matter of their Industrial Court cases were also the subject matter of the Appellant's claim in the High Court. In respect of the unauthorized profit sharing arrangement, 31 of the transactions covered by the charges are part of the overall 65 transactions in the High Court;

(2) by unequivocally withdrawing their cases in the Industrial Court (ie without reserving that it was 'without admission of liability'), they are deemed to have accepted the Appellant's decision to dismiss them for those charges;

(3) in short, by their conduct in withdrawing their cases in the Industrial Court without qualification, they admitted that they were guilty of the misconducts and the Appellant was entitled to dismiss them; and

(4) it is therefore no longer open to the Appellants to take the position in this suit that they are not liable for the same misconducts, which are also the cause of action in this suit.

(19) It is submitted that the Respondents cannot 'approbate and reprobate' and are estopped from contending now that they are not liable for the breaches of their employment contracts, which were also the substance of misconducts for which they were dismissed. Please see the Court of Appeal in *Cheah Theam Kheng v City*

Centre Sdn Bhd (see Tab 30, ABA(3)):

In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376, at pp 383–384:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

(20) In *Lennon v Birmingham City Council* [2001] IRLR 826 the UK Court of Appeal held that withdrawal of a sex discrimination complaint at the Employment Tribunal amounted to issue estoppel and the employee was estopped from bringing a civil claim on the same allegations although there was no determination of the merits of the complaint (see also *Srivatsa v Secretary of State for Health* [2016] EWHC 2916 QB).

(21) It is therefore submitted that the Respondents have conceded to liability for the breaches of their contracts of employment by withdrawing their claim for unfair dismissal *without protest*. In this regard, Appellant's claim for breach of the contracts of employment is no longer open to challenge by the Respondents.

[18] The memorandum of appeal reads as follows:

(1) The learned Judicial Commissioner erred in law and in fact when he failed to award general damages to the Appellant/Plaintiff, for the Respondents/Defendants' breaches of the terms and conditions of their respective contracts of employment, as a result of their failure to disclose, in writing, the joint purchases of the Lorong Midah and Solaris properties with the shareholders/directors of the Appellant's vendors.

(2) The learned Judicial Commissioner erred in law and in fact when he failed to appreciate that the Appellant is entitled to general damages for breaches of fiduciary obligations by the Respondents as a result of their failure to disclose, in writing, the joint purchases of the Lorong Midah and Solaris properties with the shareholders/directors of the Appellant's vendors.

(3) The learned Judicial Commissioner erred in law and in fact when he refused to grant an order for general damages on the basis that the Appellant has availed itself to the remedy of dismissal. In this regard, the learned Judicial Commissioner failed to appreciate that the remedies for breach of employment contract is not limited to the exercise of Appellant's discretion to dismiss the Respondents and would include, inter alia, a claim for general damages.

(4) The learned Judicial Commissioner erred in law and in fact when he refused to grant an order for general damages, nominal or otherwise, which is the direct and natural consequence of the proven breach of the terms and conditions of the contracts of employment of the Respondents, on the basis that the Appellant has suffered no financial losses.

(5) The learned Judicial Commissioner committed errors of law and fact when he dismissed the Appellant's claim for recovery of secret profit despite the following findings of facts:

(a) that the computer generated documents (spreadsheets) were genuinely recovered from the computer assigned to the 1st Respondent and were authentic;

(b) that the computer generated documents (spreadsheets) recovered from the computer assigned to the 1st Defendant were not tampered with ie not fabricated and planted to implicate the Respondents;

(c) that the contents of the reward spreadsheets matched the Appellant's Purchase Orders, Suppliers' Invoices and payments made therein to the vendors; and

(d) that the reward spreadsheets are direct evidence of the existence of a profit sharing arrangement.

(6) The learned Judicial Commissioner erred in law and in fact when he held that the pecuniary relationship between the Respondents and the shareholders/directors of the Appellant's vendors are merely circumstantial evidence and do not prove, on a balance of probabilities, receipt of secret profits by the Respondents and/or the third parties identified in the excel spreadsheets. In this regard, the said pecuniary relationship amplifies the probabilities of receipt of secret profits in light of all other evidence, circumstantial or direct, tendered by the Appellant.

(7) The learned Judicial Commissioner erred in law and in fact when he failed to appreciate that various circumstantial evidence as detailed in paragraph 68 of the Grounds of Judgment, when viewed together, point towards the irresistible conclusion that the Respondents and/or the third parties identified in the spreadsheets received secret profits by virtue of the profit sharing arrangement.

(8) The learned Judicial Commissioner erred in law and in fact when he failed to take into consideration the large sum of monies deposited in the various bank accounts of the 2nd Respondent, which remained unaccounted for, and further, is not commensurate with his financial standing.

(9) The learned Judicial Commissioner erred in law and in fact when he concluded that the Respondents, who owed a fiduciary obligation to the appellant, are not required to account for the secret profits made in breach of their duties as employees of the Appellant, despite the existence of sufficient evidence, circumstantial or direct, to establish that such profits were received.

(10) The learned Judicial Commissioner erred in law and in fact when he failed to take into account that the Respondents have breached their contract of employment and/or fiduciary duties by reason of their pecuniary relationship with the shareholders/directors of the Appellant's vendors.

(11) The learned Judicial Commissioner erred in law and in fact when he failed to recognize that the 1st Respondent's failure to give evidence and subject himself to cross-examination would entitle the Court to draw an adverse inference against the 1st Respondent.

(12) The learned Judicial Commissioner erred in law and in fact when he failed to

apply the binding principle propounded by the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 in respect of a party who, being fully conversant with the facts of a case, elects not to give evidence. In this regard, the learned Judicial Commissioner ought to have drawn an adverse inference against the 1st Respondent and presumed the Appellant's evidence to be true.

(13) The learned Judicial Commissioner erred in law and in fact when he misconstrued the principle in *Selvaduray v Chinniah* [1939] 3 MLJ 253 in deciding that no presumption under section 114(g) of the Evidence Act 1950 can be raised against the 1st Respondent for his failure to testify as the principle in *Selvaduray v Chinniah* relates to the shifting of burden of proof in a civil case as a result of the defendant's failure to call a material witness to support his version.

[19] We have read the appeal record and the able submissions of the learned counsel. After giving much consideration to the submission of the learned counsel for the defendants, we take the view that the appeal by the plaintiff must be allowed and the first and second defendants' appeals must be dismissed with costs. Our reasons, inter alia, are as follows:

(a) in the instant case as stated earlier, the decision of the learned judge is not in consonant with his findings of facts leaving the appellate court with no option but to set aside the judgment of the High court in refusing to enter judgment for the plaintiff;

(b) the failure of the first defendant to give evidence was fatal and any reasonable tribunal appraised of the facts of the case would have no option save to enter judgment for the plaintiff as prayed in the statement of claim;

(c) as there is no dispute as to the breach of contract, the factual matrix of the case warranted general damages to be awarded though no quantum was established. We take the view that a nominal sum of RM50,000 will be fair and reasonable on the facts of the case as damages for breach of contract and in addition we allow the prayers as follows:

(i) *against the first and second defendants*

(A) the amount of RM1,756,281 being the amount of monies paid to other third parties;

(ii) *against the first defendant*

(A) The sum of RM1,122,708;

(iii) *against the second defendant*

(A) The sum of RM687,728.20;

(iv) interest at the rate of 5%pa on the sums pleaded in paras 64(a)(i) and (ii), 64(b)(i) and 64(c)(i) of the statement of claim, from the date of the writ until full and final settlement of the judgment sum.

A (d) as the plaintiff's appeal is allowed, the consequential order will be to dismiss the defendants' appeals;

[20] For reasons stated above, the plaintiff's appeal is allowed with costs of RM50,000 as global costs for here and below and both the defendants' appeals are dismissed. The costs are subject to allocatur fees. The High Court's order is set aside. Deposits are refunded.

We hereby order so.

Order accordingly

Reported by Afiq Mohamad Noor